

ORIGINAL

1 WILLIAM V. O'CONNOR, ESQ. (CA Bar No. 057924)  
 2 DARRELL M. PADGETTE, ESQ. (CA Bar No. 199382)  
 3 KERN AND WOOLEY LLP  
 10900 Wilshire Boulevard, 11th Floor  
 4 Los Angeles, California 90024  
 Telephone: (310) 824-1777  
 Facsimile: (310) 824-0892

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5 Attorneys For Defendant  
 6 PARKER HANNIFIN CORPORATION

AT SEATTLE  
 CLERK U.S. DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 BY DEPUTY

7 UNITED STATES DISTRICT COURT  
 8 WESTERN DISTRICT OF WASHINGTON  
 9 AT SEATTLE

MDL Docket No. 1276

This Document Relates To:  
 ALL ACTIONS

10 In re AIR CRASH DISASTER  
 11 NEAR PALEMBANG, INDONESIA  
 12 ON DECEMBER 19, 1997.

DEFENDANT PARKER HANNIFIN  
 CORPORATION'S MOTION *IN LIMINE*  
 RE USE OF LORRAINE BARRICK AS  
 AN EXPERT WITNESS AND FOR AN  
 ORDER INSTRUCTING BOEING NOT  
 TO INTERFERE WITH PARKER  
 HANNIFIN'S USE OF LORRAINE  
 BARRICK AT TRIAL

NOTE ON MOTION CALENDAR:  
 Friday, October 17, 2003

Trial Date: October 27, 2003

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 99-MD-01276-M

Defendant Parker Hannifin Corporation ("Parker") moves the Court *in limine* for an order allowing it to call Lorraine Barrick as an expert witness to testify on its behalf at trial. Lorraine Barrick is an expert financial witness who has conducted an exhaustive analysis of the troubled financial condition of Captain Tsu, as well as other significant financial matters related to this case.

Ms. Barrick, a Seattle resident and subject to the subpoena power of the Court, was originally designated by The Boeing Company to analyze the voluminous

1 transactions and extensive stock trading activities of Captain Tsu prior to his death, and  
 2 in that regard, has provided a Rule 26 Report and testified at deposition in preparation  
 3 to be called as a witness for trial. In Ms. Barrick's Rule 26 Report and also at her  
 4 deposition, she concluded that Captain Tsu was insolvent at the time of his death and  
 5 that his net worth of a negative \$236,000 prior to his death, was changed to a positive  
 6 \$2.6 million upon his death.

7  
 8 Recognizing the partially intertwined defenses coexisting between Boeing and  
 9 Parker and the avoidance of cumulative testimony, Boeing and Parker explored a joint  
 10 use agreement regarding the sharing of each others' expert witnesses at trial. On  
 11 November 4 and 6, 2002, Parker's counsel, William V. O'Connor and Boeing's counsel,  
 12 Joe Silvernale agreed that each party, Boeing and Parker, could use each others' expert  
 13 witnesses at trial and could retain the other parties' experts in the event of settlement  
 14 before trial. *See Declaration of William V. O'Connor filed concurrently herewith.* Lorraine  
 15 Barrick falls under this particular agreement.

16  
 17 In addition to the agreement, Parker also cross-designated Lorraine Barrick to  
 18 testify at trial as "Parker Hannifin's Other Witnessess". *See parties' Proposed Pretrial*  
 19 *Order, attached hereto as Exhibit "1".*

20  
 21 Notwithstanding the Boeing - Parker agreement for use of expert witnesses (even  
 22 after settlement), Parker's cross-designation of Lorraine Barrick as its own trial witness,  
 23 the fact that Ms. Barrick gave a Rule 26 Report in this case, the fact that she testified at  
 24 deposition and resides within the subpoena power of this Court, there is now an attempt  
 25 to prevent Parker from calling Lorraine Barrick as its witness at trial. Legal and equitable  
 26 principles dictate that any such attempt must fail.

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I.

**EXPERT WITNESS LIMITATIONS  
ARE IN VIOLATION OF PUBLIC POLICY**

As exemplified in the opinion of the Texas Supreme Court, it is against public policy as a matter of law to preclude the use of experts by non-settling defendants. Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 560 (Tex.1990); but see Wolt, supra, 828 F.Supp. at 1567. In Tom L. Scott, Inc., the Court was concerned with the propriety of redesignating "testifying" experts to "consulting" experts pursuant to a settlement agreement between the plaintiffs and a co-defendant. The Texas Supreme Court found:

"The redesignation of experts in this case was an offensive and unacceptable use of discovery mechanisms intended to defeat the salutary objectives of discovery."

Tom L. Scott, Inc., *supra*, 798 S.W.2d at 560.

Indeed, this principle is in accord with the ABA Model Rules of Professional Conduct Rule 3.4 (2002). Model Rule 3.4 entitled, "*Fairness to Opposing Party and Counsel*" requires:

"A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

\* \* \*

- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

///

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

ABA Model Rules of Professional Conduct Rule 3.4 (2002).

Accordingly, expert witness limitations in a settlement agreement are a violation of public policy. Such a limitation is a direct contravention of public policy where, as here, Parker has an agreement with Boeing. Any attempt to obstruct Parker's access to Ms. Barrick also violates Rule 3.4(a) and (f) of the Model Rules of Professional Conduct.

## II.

### THE BOEING - PARKER AGREEMENT GUARANTEES THE USE OF MS. BARRICK

Settling defendants' expert witnesses are generally permitted to testify for remaining defendants where there is an agreement as to their shared use. See FMC Corporation v. Vendo Co., 196 F.Supp. 1023, 1047 (E.D. Cal.1996), *citing Ward v. Hill*, 489 S.E.2d 24 (W.Va.1997); see also Wolt v. Sherwood, 828 F.Supp. 1562, 1567 (D.C.Utah 1993), *quoting Board of Education v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796, 812 (W.Va.1990) ("To rely on another party's defendant's witnesses without some formal agreement as to the shared use is to invite the consequences that arose...in the present case").

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1 This comports with the policy and principle that "the public...has a right to every  
 2 man's evidence." United States v. Bryan, 339 U.S. 323, 331 (1950), *quoting* John H.  
 3 Wigmore, Evidence § 2192 (3rd ed.). "Exceptions to the demand for every man's  
 4 evidence are not lightly created nor expansively construed, for they are in derogation of  
 5 the search for truth. (footnote omitted)." United States v. Nixon, 418 U.S. 683, 710  
 6 (1974). "The primary policy behind discovery is to seek truth so that disputes may be  
 7 decided by facts that are revealed rather than concealed." Tom L. Scott, Ins. v. McIlhany,  
 8 798 S.W.2d 556, 559 (Tex.1990).

9  
 10 In the instant matter, the Boeing - Parker agreement allows either party to call the  
 11 others' expert witnesses at trial, and grants each other the right to retain each others'  
 12 experts in the event of settlement. *Declaration of William V. O'Connor*. Here, that is  
 13 exactly what happened and Parker is now entitled to rely upon the Boeing - Parker  
 14 agreement to call Lorraine Barrick to testify at trial.

### 15 16 III.

#### 17 **PARKER SHOULD STILL BE ENTITLED TO CALL LORRAINE BARRICK** 18 **AT TRIAL AS A CROSS-DESIGNATED EXPERT** 19

20 Where no agreement exists as to the use of a settling defendant's witnesses,  
 21 district courts have resorted to various standards depending on the different procedural  
 22 postures and sets of circumstances. As noted in House v. Combined Insurance Co. of  
 23 America, 168 F.R.D. 236, 240 (N.D.Iowa 1996), "[e]xamination of the pertinent case law,  
 24 of which there is surprisingly little, suggests that courts have applied three different  
 25 standards to the question of whether a party should have access to and be able to use  
 26 at trial an expert hired by [another] party." Indeed, as late as April 2002, the court in FMC  
 27  
 28

1 Corp. v. Vendo Co., *supra*, 196 F.Supp.2d at 1043, echoed that this question was  
2 "...vexing and surprisingly little explored..."

3  
4 The three standards from least permissive to most permissive are the (1)  
5 "exceptional circumstances" standard founded on Fed.R.Civ.P. 26(b)(4)(B); (2) the  
6 "discretionary" or "balancing standard" involving a balancing of the interests of the party  
7 and the court against the potential prejudice to the party who hired the expert; and (3) the  
8 "entitlement" standard apparently founded on Fed.R.Civ.P. 35. House, *supra*, 168 F.R.D.  
9 at 240; see also FMC Corp., *supra*, 196 F.Supp.2d at 1044.

10  
11 **A. The Exceptional Circumstances Standard Is Not Applicable To This**  
12 **Case.**

13  
14 The exceptional circumstances test based on Fed.R.Civ.P. 26(b)(4)(B), provides  
15 that "[a] party may...discover facts known or opinions held by an expert...who is not  
16 expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a  
17 showing of exceptional circumstances under which it is impracticable for the party seeking  
18 discovery to obtain facts or opinions on the same subject by other means".

19  
20 However, "designation of an expert as expected to be called at trial, pursuant to  
21 *Fed.R.Civ.P.* 26(b)(4)(A), even if that designation is subsequently withdrawn, takes the  
22 opposing party's demand to depose and use the expert at trial out of the "exceptional  
23 circumstances" category of Rule 26(b)(4)(B)". House, *supra*, 168 F.R.D. at 245-246; but  
24 c.f. FMC Corp., *supra*, 196 F.Supp.2d at 1046. As stated in House:

25  
26 "...once an expert is designated, the expert is recognized as  
27 presenting part of the common body of discoverable, and  
28 generally admissible, information and testimony available to  
all parties."

1 House, *supra*, 168 F.R.D. at 245.

2  
3 Here, Lorraine Barrick not only provided a Rule 26 Report, she was in fact  
4 deposed by all parties, designated by Boeing as its trial witness and cross-designated by  
5 Parker as its trial witness. Under all circumstances imaginable, Ms. Barrick was expected  
6 to be called if not by Boeing, then by Parker as a witness at trial. Under House, the  
7 balancing standard is applicable in the instant matter given the Rule 26 Report and  
8 subsequent Boeing - Parker designations. Moreover, unlike the circumstances presented  
9 in FMC Corp., and in order to specifically avoid the current situation that is attempting to  
10 be perpetuated, Boeing and Parker do have an Agreement to use each others' expert  
11 witnesses at trial even if the other settles. *See Declaration of William V. O'Connor*. As  
12 such, the exceptional circumstances test would not be applicable to the present situation.

13  
14 Parker can show exceptional circumstances to allow it to call Ms. Barrick at trial.  
15 Parker justifiably relied up on its agreement with Boeing that it could call Ms. Barrick, even  
16 if Boeing settles. Indeed such an agreement served not only the interest of the parties  
17 to the extent of their co-existing defense theories, but it also served the Court's purpose  
18 to avoid cumulative testimony. As such, with less than a month from the start of trial Ms.  
19 Barrick's analysis regarding Captian Tsu's finances and other related financial matters  
20 cannot be replicated by Parker's retention of new experts at this stage in the proceedings.  
21 Given the voluminous amount of information regarding Captain Tsu's financial  
22 transactions and stock trading, Ms. Barrick has developed a unique expertise regarding  
23 those matters. Accordingly, exceptional circumstances exist to allow Parker to call Ms.  
24 Barrick at trial, even aside from its agreement that allows Parker to do so, and in addition  
25 to its own cross-designation of Ms. Barrick as its trial witness.

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**B. The Balancing Standard Shows Parker Is Entitled To Call Ms. Barrick At Trial**

This approach requires the Court to weigh the interests of the party and the court against the potential prejudice to the party who hired the expert. House, *supra*, 168 F.R.D. at 240; see also FMC Corp., *supra*, 196 F.Supp.2d at 1044.

Here, Parker has a fundamental interest in calling Ms. Barrick because she will be able to present crucial evidence to the jury that demonstrates a financial incentive, and hence, the motive that Captain Tsu had to crash the mishap aircraft. Accordingly, Parker would be deprived of a significant portion of a fundamental defense to plaintiffs' action if it is not allowed to call Ms. Barrick. Indeed, Parker relied upon the agreement with Boeing to be able to present this testimony at trial. Boeing suffers no prejudice in allowing Ms. Barrick to testify. Indeed, Boeing fully expected Ms. Barrick would testify even if Boeing settled in accordance with the agreement of Boeing and Parker.

The importance of Ms. Barrick's testimony is underscored by Parker's act to cross-designate her as its own trial witness so that all parties would be prepared at trial. See *Exhibit "A"*. This and the Boeing - Parker agreement present the exact opposite situation found in FMC Corp. where the court was concerned that "BNSF created the situation in which it finds itself by not cross-designating FMC's experts to give notice it intended to rely on FMC's witnesses without a formal agreement as to their shared use". FMC Corp., *supra*, 196 F.Supp.2d at 1047. Here, there was an agreement. In addition, Parker cross-designated Ms. Barrick giving notice to all parties. As such, the balancing standard weighs heavily in favor of allowing Parker to call Ms. Barrick at trial.

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1 **C. The Entitlement Standard Is Not Applicable to The Present Situation**

2 The entitlement standard revolves around the context of Fed.R.Civ.P. 35. In  
3 Crowe v. Nivison, 145 F.R.D. 657 (D.Md.1993), the court held that submission to an  
4 examination by an expert "entitled" the examined party not just to a report of the  
5 examination pursuant to Fed.R.Civ.P. 35, but to a deposition of the expert for use at trial.  
6 Crowe, 145 F.R.D. 657. The rationale for such holding being "in return for suffering an  
7 invasion of his person, the examined party is entitled to make use of such information as  
8 results from the examination." Id. at 658.

9  
10 Since the parties are not dealing with a Rule 35 situation in the context of Ms.  
11 Barrick, the entitlement standard appears to be inapplicable to the present case.

12  
13 **IV.**

14 **CONCLUSION**

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16 For the foregoing reasons, Parker respectfully requests this Court to allow Parker  
17 to call Lorraine Barrick at trial and instruct Boeing not to interfere with Parker's use of  
18 Lorraine Barrick.

19  
20 DATED: October 4, 2003

Respectfully submitted,

KERN AND WOOLEY LLP



WILLIAM V. O'CONNOR  
DARRELL M. PADGETTE

Attorneys for Defendant  
PARKER HANNIFIN CORPORATION

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re AIR CRASH DISASTER  
NEAR PALEMBANG, INDONESIA  
ON DECEMBER 19, 1997

MDL Docket No. 1276  
Master File No. C99-589C

PROPOSED PRETRIAL ORDER

NOTE ON MOTION CALENDAR:  
Friday, July 25, 2003

This Document Relates To:  
*ALL CASES*

**I. JURISDICTION**

Plaintiffs in this action are citizens and residents of various states other than the states of Washington and Delaware and Ohio and/or foreign subjects, and the amount in controversy in each case exceeds \$75,000.00. Five cases are before this Court for trial on October 27, 2003:

PROPOSED PRETRIAL ORDER (MDL Docket No.  
1276; Master File No. C99-589C) - 1  
[01038-3379/SL031890.022]

**Perkins Coie LLP**  
1201 Third Avenue, Suite 4800  
Seattle, Washington 98101-3099  
Phone: (206) 583-8888  
Fax: (206) 583-8500

104. POSBank - The Development Bank of Singapore Ltd.  
73 Bras Basah Road  
POSB Centre  
Singapore 189556
105. Citibank  
Singapore Office  
20 McCallum Street  
#12-03 Asia Chambers  
Singapore 069046

**C. Parker Hannifin's Other Witnesses**

1. Lorraine Barrick  
Boeing's expert financial witness. Ms. Barrick will testify consistent with her report and deposition. Will testify.
2. Andrew Bonosky  
c/o The Boeing Company  
Mr. Bonosky will testify as an engineer concerning the horizontal stabilizer elevator. Will testify.
3. Rex Booth  
14 Somerville Lane  
Riddells Cree, VIC  
Australia 3431  
Pilot; SilkAir procedures; cause of crash  
Mr. Booth will testify on the subjects covered in his expert report and deposition. Will testify.
4. Don Boston  
c/o The Boeing Company  
Mr. Boston analyzed cockpit voice recorder data. Will testify.
5. Leon A. Boyd  
14790 North 110<sup>th</sup> Way  
Scottsdale, AZ 85255  
480/513-3314  
Will testify consistent with expert report and deposition. Will testify.

PROPOSED PRETRIAL ORDER (MDL Docket No.  
1276; Master File No. C99-589C) - 43  
[01038-3379/SL031890.022]

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, Washington 98101-3099  
Phone: (206) 583-8888  
Fax: (206) 583-8500